93-420

SUPREME COURT, U.S.
FILED
SEP 13 1993

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ISAIAH GREEN, JR.,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Fourth Circuit's upholding of summary judgment -- which disregarded race discrimination findings on the same issue by an administrative law judge, a state agency and a superior court -- undercut the policy of federal and state governments, not to mention this Court, to construct and enhance state administrative schemes to help eliminate employment discrimination?

2. Is the Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a state Superior Court judge who reviewed the hearing's transcript and evidence, inconsistent with 28 U.S.C. 1738, other Circuits, and decisions of this Court?

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IN THE SUPREME COURT OF THE UNITED STATES
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ISAIAH GREEN, JR.,
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v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Isaiah Green, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's summary judgment against him.

OPINIONS BELOW

The opinion of the Court of Appeals

for the Fourth Circuit is unpublished, and is reprinted in the appendix, p. 1a, infra.

The memorandum opinion and order of the United States District Court for the Middle District of North Carolina is unpublished and is reprinted in the appendix, p. 3a, infra.

Relevant decisions of the Wake County Superior Court, the North Carolina State Personnel Commission and the North Carolina Office of Administrative Hearings are also attached hereto, beginning at p. 31a, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1993. The Court denied a timely petition for rehearing on June 14, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

~~28 U.S~~.C. §1738. State and Territorial statutes and judicial proceedings; full faith and credit.

42 U.S.C. §2000e et seq.. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.

North Carolina General Statutes 150B "The Administrative Procedures Act.

STATEMENT OF THE CASE

Petitioner is an African-American nine-year veteran of the North Carolina Highway Patrol who attained the rank of Master Trooper. In 1981 he transferred to the enforcement section of the North Carolina Department of Transportation, Division of Motor Vehicles. Petitioner was given an assignment in Hillsborough, North Carolina. He requested a transfer to the Department's Raleigh office. In

1985 Petitioner was promoted to the rank of Law Enforcement Officer I (LEO I) and transferred to Rocky Mount, North Carolina. Then he again requested a transfer to the Raleigh office. Approximately a year later, Respondent hired a white male to fill an LEO I position in Raleigh. Petitioner filed an administrative complaint alleging racial discrimination in denying his transfer, and hiring a white applicant, Off. Bristle, from outside the agency. His complaint was heard by an Administrative Law Judge (ALJ) in the Office of Administrative Hearings, which had just been established by the North Carolina legislature in 1985 to provide full due process hearings for state employee discrimination claims, among other disputes.

The ALJ found that the Department of Transportation's:

> "stated reasons [for hiring a white LEO, instead of transferring Mr. Green] were, in fact, a pretext for discrimination. Director Stahl [of the Department of Transportation] testified that of 114 LEO I's across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were White Males, 1 White Female, 1 Black Female in an entry-level position for which Petitioner was not considered, and no Black Males. Also, no Black Male has ever filled a LEO I position in Wake County."

The ALJ found that the Department of Transportation had "not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County" and that "[e]ven if one were to conclude that Respondent has clearly articulated legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown that the stated reasons were, in fact, a pretext

for discrimination" (44a-45a). These findings were affirmed by the North Carolina State Personnel Commission at its December, 1986 meeting (35a) and by the Wake County Superior Court Judge, denying the Department of Transportation appeal, in August, 1988 (31a).

After the 1986 hearing, a continuing pattern of allegedly racially motivated actions were taken by Respondent toward Petitioner, allegedly triggered by his challenge to the hiring of Off. Bristle, and aggravated by Petitioner's success in his administrative appeals. Petitioner chose a federal forum and Title VII to fully effectuate the earlier decision and to enjoin and remedy the continuing retaliation and discrimination.

The present action, instituted after EEOC had failed to find cause, was filed in the United States District Court for

the Middle District of North Carolina. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e et seq., and under 28 U.S.C. §1331 (general federal question jurisdiction). The complaint alleged that the Petitioner was the victim of racially discriminatory pay raises, hiring practices, and transfer policies.

After discovery, the Department of Transportation moved for Summary Judgment. In response, Petitioner produced the ALJ's Findings of Fact from the Administrative Hearing (37a), the State Personnel Commission's Decision (35a) which upheld the ALJ's decision, and the Superior Court's decision (31a) which affirmed the two lower rulings of race discrimination in the hiring of the

white male for an LEO position in Wake County.

The Federal District Court Judge found "that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an inference of discriminatory intent." (25a) The district court concluded that there was no genuine issue of fact and granted summary judgment.

Petitioner appealed pro se to the Fourth Circuit Court of Appeals, which affirmed the district court in a per curiam opinion, calling Petitioner's appeal "without merit."(4a)

REASONS FOR GRANTING THE WRIT

I. **The Fourth Circuit's upholding of the summary judgment, in the face of judicial findings of race discrimination on the same issue by three layers of state administrative and judicial appeals, raises troubling**

policy questions regarding the significance of state administrative schemes which this Court has consistently supported.

This Court, the Congress and State Governments have consistently, since the 1950s, supported the establishment and use of the adjudicatory powers of state administrative bodies. Grounded in this Court's highly evolved analysis of the constitutional protections of due process and equal protection, these state administrative adjudicatory processes, when functioning properly, provide a relatively efficient, informal and accessible method to resolve disputes between citizens and their governments. The development of administrative hearings, particularly in the area of employment discrimination, has established in many states a body of expertise and experience crucial to the

effective enforcement of equal employment legislation. Administrative hearings are an inexpensive alternative to formal litigation, and are often more open to the possibility of reconciliation.

The Office of Administrative Hearings (OAH) in North Carolina is an independent, quasi-judicial agency (N.C. G.S. 150B) established in 1985 to provide a source of independent Administrative Law Judges (ALJs) to hear administrative law contested cases. The OAH is also designated as a deferral agency of the Equal Employment Opportunity Commission, and one of its primary functions is the investigation and reconciliation of allegations of discrimination brought by state employees. If attempts at reconciliation in such cases fail, the OAH's Administrative Law Judges are empowered to grant relief in disputes

between state employees and their Agencies. As independent judicial officers working in the agency charged with the protection and enforcement of the civil rights of state employees, the ALJs are a particularly valuable resource when discrimination and due process questions are raised.

On November 27, 1985, the Department of Transportation (DOT) posted a position for LEO I in Wake County. Petitioner applied for a transfer to this position. He "was not interviewed. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, only 5 or 6 are filled by Blacks." (40a) A white male was hired to fill the position.

Before the establishment of the OAH, Petitioner's only options for a due process hearing to protest his allegedly

scriminatory treatment would have been
tle VII or a 42 U.S.C. §1983 complaint.
t, since the North Carolina legislature
d set up due process administrative
arings with trained law judges with
bpoena powers, sworn witnesses, and
corded testimony, Petitioner now had an
tractive third option.

Petitioner chose this new, less
rmal, less time-consuming, and less
pensive avenue. He filed an action in
e new OAH. The low number assigned his
se -- 86 OSP 22 -- indicates it was
ong the earliest to come before the
wly created Agency.

A few months later, on August 26, -
86, ALJ Fred Morrison took sworn
stimony, with attorneys representing
th the Petitioner and Respondent DOT.
e hearing offered both sides a full and
ir opportunity for confrontation, cross

examination and discovery. During this hearing, the DOT failed to present any college records or transcripts for Officer Bristle, the white candidate hired instead for the LEO position for which Petitioner applied. DOT had no witnesses testify as to how the hiring decision was made (44a).

Within two months, the ALJ filed his recommended decision: Petitioner had been discriminated against and should be granted a lateral transfer to Wake County (46a). This was upheld by the State Personnel Commission (SPC), adopting all of the essential findings and conclusions of the ALJ (35a). The DOT appealed to the Superior Court of Wake County (N.C.G.S. 150B-45) which upheld the ALJ's and the SPC's decision because they were "supported by substantial evidence." (31a)

The new administrative scheme worked. It was relatively quick. It provided a complete due process hearing, with discovery, sworn testimony, cross examination, a written record, and documentary evidence under the N. C. Rules of Evidence, and other constitutional protections.

The DOT had two opportunities to challenge the ALJ's decision: at the SPC and the Superior Court. It lost both.

When Petitioner believed that he was being retaliated and discriminated against, he filed a Title VII claim based on this same non-transfer and the retaliation which he believed he suffered because of his (successful) administrative case. The DOT was given a new bite at the apple. This time, before a Federal Judge who did not have the whole record before him, the DOT

successfully argued that the due process hearing and findings below were wrong, and that there was insufficient evidence from which to infer racially discriminatory motives in the hiring of the external white applicant over the internal transfer of the Black applicant.

The District Court agreed.

This cavalier disregard for the adjudicatory work of state judges by the federal bench violates the full faith and credit clause and basic principles of comity and federalism. Additionally, "stripping state court judgments of finality would be ... destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by State officials." Kremer v. Chemical Construction Corp., 456 U.S. 461, 478 (1982). The Kremer majority recognized

that "state antidiscrimination laws ... play an integral role in the congressional [Title VII] scheme." Id. at 468.

Permitting federal judges to ignore that role reduces "the incentive for states to work toward effective and meaningful anti-discrimination systems." Id. at 478.

This Court defended the "detailed and well-crafted procedures for conciliation and resolution of Title VII claims." Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989). In Patterson, the Court lauded the administrative procedures built into Title VII and the potential for "conciliation rather than litigation" that such procedures afford. Id. The Court was concerned that allowing a petitioner to bring a quintessentially

Title VII claim under another federal statute would undermine the procedural mechanisms Congress specifically codified in Title VII. Allowing a federal judge to disregard the judicially affirmed results of complementary state administrative mechanisms is similarly destructive to the principles of Title VII this Court has sought to protect.

In University of Tennessee v. Elliott, 478 U.S. 788 (1986), this Court held that unreviewed state administrative proceeding have no preclusive effect in subsequent Title VII claims. This decision, when read in conjunction with Kremer, indicates a definitive federal policy of deferring to state agency decisions which are reviewed by state courts. Extending preclusive effect to such decisions is necessary if the goals and policies underlying Title VII and

state administrative policies are to have any significant meaning.

If a federal court can slight a state court's finding of race discrimination to summarily dismiss a claim based on the same issues, then there is no incentive for an employee to seek out or have confidence in the supposedly more expedient administrative remedies.

This undercuts all the efforts to simplify and expedite these cases. It complicates and delays justice. It tells litigants that administrative decisions, even when they are upheld by state court judges, are not worth the paper they are written on.

The Fourth Circuit's disregard of the state race discrimination findings here, undercut the policy of federal and state governments, not to mention this Court,

to construct and enhance state administrative schemes to help eliminate employment discrimination. The Court should grant this petition.

II. The Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a Superior Court judge who reviewed the hearing's transcript and evidence, is contrary to 28 U.S.C. 1738, and conflicts with decisions of other Circuits, and this Court.

The question of the proper preclusive effect to be given to state administrative proceedings was decided by the Court in Kremer v. Chemical Construction Corp. and University of Tennessee v. Elliott. In Kremer, after a thorough analysis of the legislative history of Title VII, the Court held that "since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that

unreviewed administrative determinations by state agencies should not preclude such review...." 456 U.S. at 470, n. 7.

The Court elevated this footnote to a holding in Elliott, holding "that Congress did not intend unreviewed state administrative proceedings to have preclusive effect in Title VII claims." 478 U.S. at 796.

The teaching of both Kremer and Elliott is that in a Title VII action, a prior state decision enjoys preclusive effect only if it has been reviewed by a state court. Mr. Kremer and Mr. Elliott both received unfavorable decisions at the administrative level. Mr. Kremer unsuccessfully appealed the decision to the state courts, and hence his Title VII action was barred. Mr. Elliott chose not to appeal his case, and was thus entitled to de novo Title VII consideration.

Here, Respondent appealed the administrative decision to the state court. The state court reviewed the decision, and upheld the finding that Petitioner had been discriminated against by Respondent. In other words, Respondent lost.

The Fourth Circuit failed to comport with the holdings of this Court in these two cases, which required that Respondent was bound by the state judicial review which it sought.

Several circuits have interpreted this Court's analysis of reviewed administrative decisions and their preclusive effects on Title VII cases. In Bray v. New York Life Insurance, 851 F.2d 60 (2nd Cir. 1988), the Second Circuit relied on Kremer and Elliott to affirm the district court's dismissal to the petitioner's Title VII claim. Unlike

Mr. Elliott, Ms. Bray sought judicial review of her administrative hearing. Citing this as the critical factor in their decision, the court held that "once a plaintiff has entered the state court system, she is bound by the preclusion rules governing that system, and the federal courts must in turn respect the finality of the judgments that issue from the state court." Id. at 64.

The Seventh Circuit has similarly adopted the Kremer and Elliott analysis, concluding that "when a state court judgment has been rendered in a state whose laws would give the judgment preclusive effect, the Supreme Court has held section 1738 applicable to preclude claims under ... Title VII." Welch v. Johnson, 907 F.2d 714, 719 (7th Cir. 1990). The court held that the proper issue before it, in a case in which an

administrative decision has been appealed to the state court, is the scope of the state's res judicata doctrine.

The Third Circuit reached an identical conclusion in Rider v. Commonwealth of PA., 850 F.2d 982 (3rd Cir. 1988).

No such issue was ever considered in the summary judgment order entered in the instant case however. The district judge examined the prior, judicially affirmed finding of discrimination and, instead of granting it preclusive effect, concluded that "plaintiff cannot establish a prima facie case ... of discrimination." (25a) The Fourth Circuit upheld this negligent determination.

In McInnes v. State of California, 943 F.2d 1088 (9th Cir. 1991), the Ninth Circuit carefully studied the functions of the State Personnel Board to determine

whether it was a "court" whose decisions are entitled to preclusive effect under §1738. Concluding it was in fact only an administrative agency, the court of appeals relied on Elliott to reverse the district court's entry of summary judgment on behalf of the appellees. "Elliott establishes a bright-line rule that an administrative determination is entitled to preclusive effect in a subsequent Title VII action only if it has been reviewed by a court." Id. at 1095.

The preclusive effect of reviewed administrative decision envisioned by this Court and the four circuit courts cited should, at a minimum, be sufficient to meet the summary judgment standard in subsequent Title VII proceedings.

The Fourth Circuit has only considered this Court's decisions in

Kremer and Elliott in the §1983 context. In that context, it has accepted the Court's ruling that a state administrative agency acting in a judicial capacity is entitled to the same preclusive effect in federal court as it is given in state court. Layne v. Campbell County Dept. of Social Services, 939 F.2d 217, 220 (4th Cir. 1991), O'Reilly v. County Board of Appeals, 900 F.2d 789, 791 (4th Cir. 1990).

The Fourth Circuit's only references to preclusion in the Title VII context are vague and oblique asides. In a footnote in Layne, the court notes that the Supreme Court has "applied this preclusive effect test to the ... Reconstruction civil rights statutes, but not to ... Title VII claim ...." 939 F.2d at 219 n. 7. In Crowley v. Prince George's County, MD., 890 F.2d 683 (4th

Cir. 1989), the court applied this "preclusive effect" test-- established by this Court for §1983 actions only-- to a Title VII claim. It held that because the Maryland courts "would not accord preclusive effect to the findings of the personnel board," such findings should have no bearing in the Title VII action. Id. at 688.

The Fourth Circuit fundamentally misconstrues the meaning of Kremer and Elliott, which provide that judicially reviewed administrative decisions are entitled to preclusive effect in Title VII actions; unreviewed ones are not.

If the Fourth Circuit were to consistently apply its "preclusive effects" test, as it purported to do in Crowley, an "unreviewed" decision of the Office of Administrative Hearings would invariably pass that test and be accorded

full preclusive effect.

This Court, the Fourth Circuit notwithstanding, has limited the use of the "preclusive effects" test solely to §1983 actions. The Supreme Court has adopted the bright-line, judicial review analysis of Elliott for Title VII actions.

The Fourth Circuit, in conflict with this Court and the other circuits cited, has failed to adopt and enforce these holdings. In view of this clear conflict, the Court should grant this petition to resolve this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(919) 968-1278
Counsel for Petitioner

Dated: Chapel Hill, NC
September 12, 1993

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APPENDIX

F I L E C O P Y
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

June 14, 1993

No. 92-1933
CA-90-289-2

ISAIAH GREEN, JR.
Plaintiff - Appellant

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Division of Motor Vehicles

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISAIAH GREEN, JR.
Plaintiff - Appellant

v. No. 92-1933

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Division of Motor Vehicles
Defendant - Appellee

Appeal from the United States District Court for the Middle District of North Carolina at Raleigh. Hiram H. Ward, District Judge.
(CA-90-289-2)

Submitted: March 16, 1993

Decided: May 18, 1993

Before PHILLIPS, NIEMEYER, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Isaiah Green, Jr., Appellant Pro Se.
Harold Franklin Askins, Assistant Attorney General, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Isaiah Green, Jr., appeals from the district court's order denying him relief under 42 U.S.C. §§ 2000e - 2000e-17 (Title VII) in case number 92-1933. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Green v. North Carolina Department of Transportation, No. CA-90-289-2 (M.D.N.C. July 21, 1992).

No. 92-1933 AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

ISAIAH GREEN, JR., Plaintiff	:	
v.	:	No. 2:90CV289
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, Defendant	:	

MEMORANDUM OPINION AND ORDER

WARD, Senior Judge

This matter comes before the Court on defendant's Motion to Dismiss for lack of subject matter jurisdiction and defendant's Motion for Summary Judgment due to an absence of factual bases to support plaintiff's claims. For the reasons stated herein, the Court will deny defendant's Motion to Dismiss, but will grant defendant's Motion for Summary Judgment.

I.

The relevant facts of this case are as follows. On June 15, 1981, plaintiff, Isaiah Green, Jr., voluntarily transferred from his position with the North Carolina Highway Patrol ("Patrol") to the Enforcement Section of the North Carolina Department of Transportation, Department of Motor Vehicles ("Department"). At the time of the transfer, plaintiff had served nine years with the Patrol and had attained the rank of Master Trooper. As a Master Trooper, the Patrol compensated plaintiff at a pay grade of sixty-nine which equated to a salary of approximately $18,500 per year. In his new position of Vehicle Inspection Officer ("VIO"), Plaintiff's pay grade dropped to sixty-one with a corresponding salary of $15,540. A pay grade of sixty-one

represented the top of the pay scale for the VIO position, and the Department placed plaintiff at this level pursuant to State personnel policy. Plaintiff's initial assignment as a VIO was in Hillsborough, North Carolina. Plaintiff immediately requested a transfer to Raleigh, North Carolina.

On January 1, 1985, the Department promoted plaintiff to the position of Law Enforcement Officer I ("LEO I") with a pay grade of sixty-nine and transferred plaintiff to Rocky Mount, North Carolina. As a result, plaintiff's salary increased to $22,572, the maximum allowed under State personnel guidelines. Again, plaintiff requested a transfer to the Department's Raleigh office.

On February 1, 1986, the Department hired Emanuel Bristle ("Bristle") to fill an LEO I position in Raleigh. Bristle

was a white male who had not been previously employed by the State. Bristle came to this post with a Bachelor's degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience

On March 4, 1986, pursuant to N.C. Gen. Stat. § 150B-23 (1983), plaintiff filed a petition with the North Carolina Office of Administrative Hearings where he alleged that the Department was guilty of racial discrimination in that the Department had hired Bristle for the above mentioned position instead of honoring plaintiff's request for a transfer to Raleigh. After conducting a hearing, the Office of Administrative Hearings issued a decision in favor of plaintiff.

On April 29, 1986, plaintiff also filed a complaint with the

Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination due to Bristle's hiring. However, unlike the State's Office of Administrative Hearings, the EEOC determined that there was no just cause for the charge.

On October 8, 1986, the Department hired Ronald Reams for an LEO I position in Raleigh. Again, plaintiff filed a petition in the Office of Administrative Hearings and with the EEOC alleging racial discrimination. These petitions were dismissed.

In March 1988 the Department offered plaintiff a transfer to an LEO I position in Raleigh. Plaintiff refused this transfer stating that the position was that of an undercover inspector which, according to plaintiff, was a low status position historically held by "rookies."

On October 27, 1988, plaintiff filed another charge of race discrimination with the EEOC alleging that the Department had wrongfully denied him a lateral transfer to Raleigh on October 17, 1988. This charge apparently arose out of the switching of job assignments by two LEO I's already stationed in Raleigh which plaintiff perceived as creating a new LEO I position in that office. After investigating, the EEOC issued a no just cause finding.

On January 30, 1990, plaintiff filed yet another EEOC complaint alleging race discrimination and retaliation regarding the pay of a newly hired LEO I and the reclassification of a second LEO I. The EEOC made a finding of no just cause and plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina. Soon

thereafter, plaintiff voluntarily dismissed the action.

On April 10, 1990, the Department notified plaintiff that he was to transfer to an LEO I position in Raleigh effective May 1, 1990. Plaintiff accepted this transfer and remains in this position today.

In his complaint, plaintiff alleges that the Department violated 42 U.S.C. § 1981 (1988), 42 U.S.C. § 1983 (1988) and 42 U.S.C. 2000e et sec. (1988) ("Title VII"). Further, plaintiff maintains that the Department is liable under a State common law claim of intentional infliction of mental anguish. However, in his response to defendant's Motion to Dismiss and Motion for Summary Judgment, plaintiff abandoned his claims under 42 U.S.C. §§ 1981 and 1983 as well as his State common law claim. Therefore,

plaintiff's Title VII claim is the sole remaining cause of action with any potential viability.

Defendant maintains that the Court does not have subject matter jurisdiction over any of plaintiff's claims. However, it is clear that pursuant to 28 U.S.C. § 1331 (1988), which governs federal question jurisdiction, such is not the case with regard to plaintiff's Title VII claim. Accordingly, the Court will address the merits of plaintiff's Title VII claim below.

II.

Plaintiff argues that there are three circumstances where the Department's actions have resulted in Title VII violations. First, plaintiff alleges that the Department violated Title VII prohibitions in its treatment of him and other black members of the

Department with regard to merit raises. Second, plaintiff asserts that the Department treated him and other black members of the Department unfairly in its hiring practices. Finally, plaintiff maintains that the Department refused his requests for lateral transfers to Raleigh because of his race and in retaliation for previously filed EEOC complaints. The Court will deal with each of plaintiff's allegations in turn.

III.

A moving party is entitled summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure where he shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ. P. 56(c). In the instant case, defendant has moved for summary judgment. As no unsettled issues

of material fact exist, defendant's Motion for Summary Judgment will be granted.

A. Title VII

Title VII provides, in pertinent part, that:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

> religion, sex, or national origin.

42 U.S.C. 2000e-2(a) (1988).

In Title VII cases involving allegations of disparate treatment, such as the instant case, a plaintiff must prove intentional racial discrimination. Autry v. North Carolina Dept. of Human Resources, 820 F.2d 1384, 1385 (4th Cir. 1987). A plaintiff bears the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). To satisfy this requirement, a plaintiff need only raise an inference that a defendant acted with discriminatory intent. Moore v. Charlotte, 754 F.2d 1100, 1105 (4th Cir.), cert. denied, 472 U.S. 1021 (1985), by eliminating the most common nondiscriminatory reasons for the

plaintiff's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); see also, Moore, 754 F.2d at 1105. Additionally, a Prima facie case of race discrimination under Title VII requires a plaintiff to demonstrate a nexus between the race of the complainant and the particular employment decision being challenged. Autry, 820 F.2d at 1385.[1]

---

[1] The Supreme Court set forth the most common method of establishing a prima facie case of race discrimination under Title VII stating that a plaintiff may show:

> (i) that he belongs to a [protected] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

If a plaintiff overcomes this burden, the defendant must then articulate a legitimate, nondiscriminatory reason underlying the employment decision in question. Burdine, 450 U.S. at 254; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the defendant is able to advance a legitimate, nondiscriminatory reason for the action complained of, the burden shifts back to the plaintiff who then has the "ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. The plaintiff may meet this burden in either of two ways: "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence." Id.

1. *Plaintiff's Merit Raise Claim*

As stated above, plaintiff alleges that the Department engaged in discriminatory practices with regard to merit salary increases given in 1986. Specifically, plaintiff contends that, despite an "acceptable" performance rating, the Department denied him a merit pay increase in 1986 when "all" the white employees in the Department's Greensboro, North Carolina facility received such an increase. (Deposition of Isaiah Green, Jr., June 21, 1991, at 13-25 [hereinafter Green Deposition]). Further, plaintiff maintains that the only other black employee reporting to the Greensboro office received a lesser merit pay increase than did his

non-minority counterparts. Id. at 16. Simply put, there is no basis in fact for plaintiff's allegations.

It is State policy that not all employees who are eligible for a merit increase by virtue of an "acceptable" performance rating receive such an increase. The Court finds this policy to be valid based upon the State's limited resource base. Accordingly, it would not be discriminatory to deny some employees a merit increase while other similarly situated employees received such an increase unless the decision as to who received the merit increases was based upon prohibited criteria such as race, sex or national origin. Such is clearly not the case here.

First, plaintiff's contention that "all" the non-minority employees reporting to the Department's Greensboro

facility received merit increases is inaccurate. While it is true that plaintiff's performance rating was "acceptable" and that he did not receive a merit increase in 1986, at least two non-minority employees in the Greensboro office, Gary Wayne Tutterow and Robert Eugene Mann, did not receive increases either, notwithstanding their "acceptable" performance ratings.

Second, plaintiff asserts that the other black employee, Alfonzo Everette, reporting to the Greensboro office received a lesser increase than his non-minority counterparts. However, as stated above, neither Mr. Tutterow nor Mr. Mann, both non-minority employees, received a merit increase of any kind. Thus, any merit increase received by Mr. Everette, regardless of its amount, was greater than that received by Mr.

Tutterow and Mr. Mann. This fact clearly undermines plaintiff's assertion that the Department discriminated on the basis of race in awarding merit increases in 1986. Therefore, the Court finds that plaintiff's claim must fail.

2. Plaintiff's Unfair Hiring Practices Claim

Plaintiff also maintains that the Department engaged in unfair hiring practices relating to plaintiff's starting salary with the Department. According to plaintiff, the Department required plaintiff to accept a decrease in pay upon accepting his VIO position in 1981 while it did not require a non-minority employee to take such a reduction. (Green Deposition at 25-32). This claim is totally unsupported by the evidence plaintiff presents.

In 1981 plaintiff voluntarily

transferred from the Patrol to the Department. In so doing, plaintiff voluntarily took a demotion from Master Trooper to VIO. As a Master Trooper, the Patrol compensated plaintiff at a pay grade of sixty-nine which equated to a salary of approximately $18,500 per year. In his new VIO position, plaintiff's pay grade dropped to sixty-one with a salary of $15,540. However, a pay grade of sixty-one represented the top of the pay scale for the VIO position and the Department placed plaintiff at this level pursuant to State personnel policy. Additionally, plaintiff has received significant pay increases throughout his tenure with the Department and his salary continually ranks at the high end of the allowable compensation scale. Again, plaintiff presents no evidence establishing a prima facie case of

discrimination under Title VII.

3. Plaintiff's Failure to Transfer Claims

It is difficult to discern from plaintiff's pleadings the factual bases of plaintiff's Title VII claims as they relate to his being denied requested transfers to the Department's Raleigh office. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and for Summary Judgment gives a cryptic recitation of the relevant facts and is conspicuously lacking in authority supporting plaintiff's position.

In any event, a review of the evidence reveals that plaintiff's claim appears to be founded on three instances of alleged discrimination: (1) the Department's hiring of Bristle to fill a newly created LEO I position for the Emissions Inspection Program in Raleigh

in February 1986 (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and For Summary Judgment at 5); (2) the Department's hiring of Reams to fill an existing LEO I position in Raleigh in October 1986; and (3) the Department's administrative change in the Raleigh office in October 1988 which plaintiff declares created a new LEO I position to which he was not transferred. (Green Deposition at 31-45).

It is undisputed that the Department hired Bristle to fill an LEO I position in Raleigh on February 1, 1986. Bristle was a non-minority male who had not previously worked for the State. Bristle came to this post with a Bachelor of Arts degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience. As a result, plaintiff filed complaints with the North

Carolina Office of Administrative Hearings and the EEOC. The Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge.

After reviewing the evidence presented by plaintiff, the Court finds that, while plaintiff may have been qualified for this LEO I position, a reasonable person could readily have decided that Bristle's educational and investigative qualifications were preferable to those of plaintiff. The Court finds that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an interence of discriminatory intent. Consequently, since plaintiff cannot establish a prima facie case either

through direct evidence of discrimination or indirect evidence that would support a reasonable probability that plaintiff would have been transferred but for his race, his claim must fail.

The same holds true for plaintiff's claim as to his denial of a transfer in October 1986. The Court is not persuaded by plaintiff's sweeping contention, made with little evidentiary support, that the Department failed to choose plaintiff on the basis of his race. The evidence illustrates that after the interview process in which plaintiff was a participant, the Department ranked plaintiff third among the candidates vying for the position behind Reams and a non-minority female. The proffered basis for Reams superior ranking was his superior educational background which included an Associate's degree and

Bachelor's degree in Business Administration as well as his supervisory and investigative experience. The evidence, even when taken in the light most favorable to plaintiff, simply does not raise an inference of discrimination.

Finally, plaintiff argues that the Department denied him a transfer to Raleigh in 1988 in retaliation for his having filed an EEOC complaint in October of 1987. The Department asserts that there was never a vacant LEO I position available in Raleigh in 1988. This is so, according to the Department, because the alleged position was simply the result of an administrative change between two existing Raleigh LEO I's, and no new position was created at that time. Again, plaintiff's contention does not conform to the evidence presented. Instead, the evidence supports the Department's contention that the

position "created" in Raleigh in 1988 was not a new position at all, but simply an administrative change where the job assignments of two existing Raleigh Inspectors, Reams and Lawrence, were reversed for legitimate management reasons. Accordingly, the Court finds that plaintiff again has failed to meet his burden of establishing a prima facie case of discrimination.

On April 10, 1990, the Department notified plaintiff that he was to transfer to an LEO I position in Raleigh effective May 1, 1990. Plaintiff accepted this transfer and remains in this position today. Nevertheless, plaintiff filed this lawsuit on June 7, 1990 alleging the violations discussed above. The evidence plaintiff presents in support of his charges of racial discrimination by the Department is anecdotal at best and

inaccurate at worst. The Court finds that plaintiff has failed to produce a *prima facie* case of discrimination through any of his allegations. In fact, it is the conclusion of the Court that, construing all the evidence presented by plaintiff in the light most favorable to him, he has failed to raise more than a remote possibility that but for his race he would have been treated any differently by the Department. Accordingly, for the reasons stated above, defendant's Motion to Dismiss will be denied and defendant's Motion for Summary Judgment will be granted.

IT IS THEREFORE, ORDERED that defendant's Motion to Dismiss for lack of subject matter jurisdiction be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED.

_____
United States District Judge
July 21, 1992.

STATE OF NORTH CAROLINA
IN THE COUNTY OF WAKE

North Carolina Division of Motor Vehicles, Petitioner	)	
vs.	)	ORDER
Isaiah Green, Jr., Respondent	)	

This matter came on for hearing before the undersigned Judge residing at the July 8, 1988 Civil Term of Wake County Superior Court upon a Petition of the North Carolina Division of Motor Vehicles for Judicial Review of a final Order of the State Personnel Commission, dated December 22, 1986, which adopted the Administrative Law Judge's Recommended Decision to transfer the Respondent to the first Law Enforcement vacancy in Wake County which occurs following the effective date of the Decision and Order and to pay Respondent's reasonable attorney's fees. At the time

this matter was called for hearing. Petitioner was represented by Jane P. Gray, Special Deputy Attorney General. Respondent was represented by counsel, Anita Davis Pearson of Raleigh, North Carolina.

Having reviewed the pleadings, transcript and the entire record, as well as briefs and arguments of counsel, this Court finds and concludes as follows regarding the Exceptions to the Order of the State Personnel Commission noted by the Petitioner:

1. Finding of Fact No. 6 is supported by competent evidence viewed in light of the record as a whole.

2. Findings of Fact Nos. 11, 12, 13 are supported by competent evidence viewed in light of the record as a whole.

3. Finding of Fact No. 17 is supported by competent evidence viewed in light of

the record as a whole.

4. Finding of Fact No. 19 is supported by competent evidence viewed in light of the record as a whole.

5. Finding of Fact No. 22 is supported by competent evidence viewed in light of the record as a whole.

6. Findings of Fact Nos. 23 and 24 are supported by competent evidence viewed in light of the record as a whole.

7. Finding of Fact No. 25 is supported by competent evidence viewed in light of the record as a whole.

8. Finding of Fact No. 26 is supported by competent evidence viewed in light of the record as a whole.

9. Conclusions of Law Nos. 2, 3 and 9 are supported by competent evidence and by findings of fact.

10. Conclusion of Law No. 5 is not supported by competent evidence or by

the findings of fact but this deficiency standing alone does not justify reversal or remand.

11. Petitioner's request for Additional Proposed Findings of Fact is denied.

For the foregoing reasons, the Court concludes as of law that the Order of the State Personnel Commission is supported by substantial evidence in view of the entire record.

WHEREFORE, IT IS NOW ORDERED, ADJUDGED AND DECREED that the Decision and Order of the State Personnel Commission of December 22, 1986, be and the same is affirmed in its entirety. This Petition is dismissed with prejudice and Petitioners shall pay the costs of this action.

This the 20th day of August, 1988.

B. Craig Ellis

Superior Court Judge

STATE PERSONNEL COMMISSION

ISAIAH GREEN, PETITIONER	)DECISION AND ORDER)FOR THE FULL) COMMISSION
- vs -	) BY
DIVISION OF MOTOR VEHICLES,	) RICHARD V. LEE,
RESPONDENT	) DIRECTOR OF STATE PERSONNEL

The full State Personnel Commission considered the Recommended Decision of the Office of Administrative Hearings Administrative Law Judge, Fred G. Morrison, Jr. at its meeting of December 18, 1986. Members of the Commission participating in the decision were: Mrs. Polly W. Brewer, Dr. Stephen Thomas, Mrs. Marlene Safrit and Miss Leonora Carawan.

A P P E A R A N C E S

For the Petitioner: Ms. Anita Davis, Currie, Pugh and Davis; Raleigh, North Carolina, appearing.

For the Respondent: Ms. Jane Grey, Special Deputy Attorney General, Attorney General's Staff, appearing.

After full consideration of this matter, the State Personnel Commission hereby adopts the findings and conclusions of the Recommended Decision as its own, except that the Commission specifically

declines to adopt the ALJ's Conclusion number 5. The Commission declines to adopt this Conclusion in that the record clearly sets forth that the issue of abuse of discretion was rot raised by either party and was not dealt with in the hearing. Thus, a conclusion on such an issue is beyond the authority of the ALJ or the Commission to decide.

Based upon its adoption of the Recommended Decision, the Commission hereby orders that:

(1) the Respondent transfer the Petitioner to the first LEO I vacancy in Wake County which occurs following the effective date of this Decision and Order;

(2) the Respondent pay Petitioner's reasonable attorney's fees in this matter; the amount of such fees to be determined by a submission from Petitioner's attorney setting forth an itemization of attorney's fees in this matter, such submission to be made jointly to this Commission and Respondent. An award of such fees shall be made at the next meeting following this Decision and Order.

Richard Y. Lee
Director of State Personnel

12/22/86

cc: Honorable William S. Hiatt
Mr. Isaiah Green, Ms. Anita Davis
Ms. Jane Grey, Ms. Jeanne Horton

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
COUNTY OF WAKE

96 OSP 22

ISAIAH GREEN JR., Petitioner,	)
	) RECOMMENDED
v.	) DECISION,
	) G.S. 150b-34
NORTH CAROLINA DIVISION OF MOTOR VEHICLES, Respondent.	)

The appeal of Isaiah Green Jr., an employee of the Division of Motor Vehicles, was heard by Fred Gilbert Morrison Jr., Administrative Law Judge, Office of Administrative Hearings, on August 28, 1996 in Raleigh, North Carolina.

The hearing was called to order at 10:00 a.m.

APPEARANCES

FOR THE PETITIONER: Currie, Pugh & Davis of Raleigh, North Carolina; Ms. Anita F. Davis, appearing.

FOR THE RESPONDENT: The Honorable Lacy H. Thornburg, Attorney General, Raleigh, North Carolina;
Ms. Jane P. Gray, Special Deputy Attorney General, appearing.

ISSUE

Did Respondent illegally discriminate against Petitioner on the basis of his race in denying his request for a lateral transfer to Wake County?

OPINION OF THE HEARING OFFICER

Based on competent evidence admitted at the hearing, the Hearing Officer makes the following:

FINDINGS OF FACT

1. Mr. Isaiah Green Jr. (Petitioner) is employed as a Law Enforcement Officer I (LEO I) with the Division of Motor Vehicles (Respondent). At the time of this appeal the Petitioner had thirteen (13) years of continuous State service.

2. The parties have stipulated that the Petitioner is a permanent state employee subject to the State Personnel Act and that the Office of Administrative Hearings has jurisdiction to hear his case.

3. Petitioner is a Black Male who meets the Respondent's qualifications/requirements for the position or LEO I which he has filled since January 1, 1985.

4. Petitioner's first assignment of duty as a LEO I was in Rocky Mount, North Carolina.

5 Petitioner has requested verbally and

in writing several times a lateral transfer to Wake County since his promotion to the LEO I position.

6. Since being promoted to the LEO I position the Petitioner's work performance has been rated by his superiors as "Overall Acceptable" with commendation for participation in the Theft Investigation Program noted on his Work Planning/Performance Review form for the period July 1, 1985 to June 30, 1986. (Petitioner's Exhibit #2).

7. On 8-1-85 the Petitioner received a performance salary increase from $23,700.00 to $24,792.00.

8. Petitioner's prior work with Respondent as Vehicle Inspection Officer was rated as "Overall Acceptable" or "Overall Satisfactory".

9. Prior to joining Respondent the Petitioner had 10 years of service as a Trooper with the State Highway Patrol which included 960 hours of training at the UNC-CH Institute of Government. Petitioner is a high school graduate and a Certified Law Enforcement Officer.

10. On 8-1-85 Manuel Cruz, a former policeman in Rocky Mount, was employed by Respondent in a LEO I position and was assigned to Orange county.

11. Manuel Cruz wanted to be assigned to Nash County; he knew of Petitioner's desire to be transferred to Wake County; he

discussed with Petitioner and their superiors an exchange of duty stations so each could be nearer or with their families.

12. Mr. F. E. Holmes, Petitioner's District Supervisor, suggested that Petitioner exchange duty stations to accommodate Cruz and told Petitioner that he would have no objection if Petitioner could arrange a future transfer to Wake County.

13. Based upon his understanding that an exchange of duty stations with Manuel Cruz would be a step toward an eventual transfer to Raleigh, Petitioner exchanged duty stations with Cruz and went to Orange County on 9-2-85.

14. On 11-27-85 the Respondent by job posting sought applicants for a LEO I position in Wake County.

15. Petitioner applied verbally and in writing for the LEO I position in Wake County and requested a lateral transfer from Orange to Wake County.

16. Donald Stahl, Respondent's Director of Enforcement, advised Petitioner that his request was being considered but that the subject position would likely be filled by a new hire.

17. Petitioner was not interviewed for the LEO I position in Wake County. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, only 5 or 6 are filled by Blacks.

18. Respondent employed Emanuel C. Bristle, a White Male, in the position. Bristle was living in Jefferson, North Carolina when he applied and wanted to be assigned to Union County, North Carolina.

19. Director Stahl testified that he recommended Bristle's employment based upon information received that Bristle was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations. Stahl said he wanted Bristle in Wake County because it has a large number of stolen vehicles. Stahl sat in on the interview of Bristle, but did not participate in or conduct it.

20. Respondent filled nine other LEO I positions along with Bristle's, two being Females (including 1 Black Female in Wake County) and seven other White Males. The position filled by a Black Female was new and not the seat sought by Petitioner as its beginning salary was much below his current pay.

21. Petitioner's promotion from VIO to LEO I effective January 1, 1985 was shortly before Republican Governor James G. Martin succeeded former Democratic Governor James B. Hunt Jr. Respondent took no action to revoke this promotion as it did several others similarly made.

22. During his 13 years as a State employee the Petitioner has received commendations for his service from many citizens and public officials (such as Secretary of State Thad Eure and former Secretary of Transportation Thomas Bradshaw).

23. Respondent's officials suggested, encouraged and approved the lateral transfers and exchange of duty stations involving the Petitioner and Manuel Cruz in August of 1985 primarily so Cruz could reside with his family in Rocky Mount.

24. Respondent's officials have not approved Petitioner's repeated requests for a lateral transfer to Wake County so he can continue to reside with his family in Raleigh and not be required to move them to Hillsborough.

25. The Commissioner of Motor Vehicles confirmed Director Stahl's recommendation and made the ultimate decision to hire Emanuel Bristle and any Petitioner's request for lateral transfer.

26. The Commissioner of Motor Vehicles was not presented as a witness to give or explain his reasons for employing Bristle and denying Petitioner's request for a lateral transfer. No college records or transcripts for Bristle were introduced, nor did his interviewers testify as to procedures used in making their recommendation to the Commissioner.

27. Respondent's posted qualifications for the subject position were: Graduation from high school and five (5) years of law enforcement or investigative experience; or an equivalent combination of training and experience. Certified Law Enforcement Officer. Involves enforcement of state law and regulations relating to the operation and sale of motor vehicles, laws pertaining to registration, weight, licensing

of dealers and manufacturers, theft investigation, liability insurance inspections and the collection of licensing fees.

Based on the above Findings of Fact, the Hearing Officer makes the following:

CONCLUSIONS

1. Because Petitioner is a permanent State employee who has alleged race discrimination as the reason for the denial of his request for a lateral transfer from Orange County to Wake County, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a recommendation to the State Personnel Commission which shall make the final decision in the matter. North Carolina General Statutes 126-36, 126-37 and 150B-23.

2. Where discrimination is an issue, Petitioner bears the ultimate burden of proof and must establish a prima facie case of discrimination by providing sufficient facts in order to raise an inference of discrimination. In order to establish a prima facie case of discrimination, Petitioner has shown the following:

   - that he is a member of a protected class (minority);
   - that Respondent was recruiting to fill the vacant LEO I position in Wake County;
   - that he applied for the vacant position which he was qualified for

and requested a lateral transfer to Wake County;

- that a white person was selected over him.

Thus, Petitioner has established a prima facie case of discrimination.

3. The Respondent has not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County. Donald Stahl testified that he recommended Emanuel C. Bristle because he was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations while Petitioner had only a high school diploma with limited stolen vehicle investigations. Stahl only sat in on Bristle's interview and Petitioner was not even afforded an opportunity to be interviewed by those conducting same. No details were presented as to the interviews or criteria used before recommendations were made to the Commissioner. No college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations, except that Petitioner had been commended by his superiors for participation in its theft investigation program and also received a performance salary increase on August 1, 1985.

4. Even if one were to conclude that Respondent has clearly articulated

legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown that the stated reasons were, in fact, a pretext for discrimination. Director Stanl testified that of 114 LEI Is across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were White Males, 1 White Female, 1 Black Female in an entry-level position for which Petitioner was not considered, and no Black Males. Also, no Black Male has ever filled a LEO I position in Wake County.

5. It is further concluded that Respondent abused it discretion in denying Petitioner's request for a lateral transfer to Wake County as its officials actively sought his assistance in accommodating his subsequently assumed a passive role when Petitioner had an opportunity to transfer to his home county. Respondent's actions in the Cruz transfer certainly led Petitioner to believe he would be similarly accommodated when a LEO I position became available in Wake County. Also, Respondent filled 10 LEO I positions across North Carolina at the time it denied Petitioner's request for a lateral transfer so there were multiple possibilities to honor the request of a veteran State employee with a satisfactory work record and hire 10 new officers (one of which could have filled Petitioner's position in Orange County upon his transfer to Wake County).

Based on the above Findings of Fact and Conclusions, the Hearing Officer makes the following:

RECOMMENDED DECISION

1. That Petitioner be granted a lateral transfer to Wake County;

2. That Petitioner be granted reasonable attorney's fees for legal expenses incurred in prosecuting his appeal before the Office of Administrative HeArings and the State Personnel Commission.

Fred Gilbert Morrison Jr.
Administrative Law Judge
Hearing Officer
October 24, 1986